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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. COREY BOULDEN et al., Defendants and Appellants.	B170806 (Los Angeles County Super. Ct. No. NA055521)

APPEALS from judgments of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed as modified.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant Corey Boulden.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant Marquis Land.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III, IV, V, and VI of the Discussion.

Herbert S. Tetef, Lawrence M. Daniels and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Marquis Land and Corey Boulden,[1] along with codefendant James Boulden,[2] were charged and convicted of first degree burglary (Pen. Code, § 459[3]) and attempted first degree burglary (§§ 664/459).

Land was charged separately with one count of providing false information to a police officer (§ 148.9, subd. (a)), a charge that was subsequently dismissed. In addition, it was alleged that he had suffered two serious felony convictions within the meaning of the "Three Strikes" law (§ 667, subd. (a)-(i) and § 1170.12, subd. (a)-(d)), and had served two terms in state prison within the meaning of section 667.5, subdivision (b).) Land's motion to sever his trial was denied.

With respect to Corey Boulden, it was alleged that he had suffered one prior felony conviction within the meaning of the Three Strikes law, and that he had served two prior prison terms in state prison within the meaning of section 667.5, subdivision (b).

After the jury rendered its verdict, the court found the allegations of prior convictions and prison terms to be true. The court denied Land's motion to strike a prior conviction or convictions. He was sentenced to a state prison term for a

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[1] Corey Boulden's name was spelled "Bolden" in the information. However, we adopt for purposes of this appeal the spelling contained in his brief on appeal and the abstract of judgment.

[2] James Boulden appealed separately in case no. B169371. Because they share the same surname, James and Corey Boulden will be referred to herein either by their full names or their first names.

[3] Unless otherwise indicated, all statutory references herein are to the Penal Code.

period of 60 years to life, based on: (1) an indeterminate term of 25 years to life on count one; (2) an indeterminate term of 25 years to life on count two to run consecutively; (3) two 5-year enhancements for the two prior serious felony convictions (§ 667, subd. (a)) to run consecutively. Land was credited with 303 days based on 264 days in actual custody and 39 days good time/work time.[4]

Corey Boulden's motion to strike a prior was also denied. He was sentenced to 15 years, eight months, consisting of: (1) four years doubled to eight years for count one; (2) 16 months doubled to 32 months (or two years, eight months) for count two; and (3) an enhancement of five years for the prior serious felony, all to run consecutively. He received 360 days of presentence credit based on 256 days in actual custody plus 50 days of good time/work time credit.

Land and Corey Boulden filed timely notices of appeal.

EVIDENCE AT TRIAL

Lorraine Adrid, who lived in the 1400 block of West O'Farrell Street[5] in San Pedro, left for work on January 27, 2003, at around 8:00 a.m. Her 100-pound German Shepherd dog was inside the house. Later in the day, she heard about suspected burglaries in the area, and left work to talk to the police. When she arrived back home, she noticed that the sliding glass door in the back of her house was out of place, as though someone had tried to pry it open. In addition, the screen was open. But she saw no evidence that anyone had gotten inside.

Stanley Nowinski lived on the 1400 block of O'Farrell, near Adrid. On January 27, 2003, he left his house at around 6:30 a.m. His wife left later. When

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[4] The abstract of judgment states that Land received 36 days good time/work time credit and a total of 300 days presentence credit.

[5] West O'Farrell Street is referred to herein as "O'Farrell."

Nowinski left, he checked that all the doors were locked except the kitchen door, which his wife generally locked when she left. Between 9:00 and 9:30 a.m., he received a call, and returned home. When he got there, the police were inside and most of the rooms were in disarray. The back window and back door of the house were open. The window screen had been taken out. Someone had left a screwdriver that did not belong to Nowinski near the window. There was a pair of Nowinski's gloves left on top of the trash bin in the backyard. Several items were in a duffle bag by the back door, such as video game systems, coins, and a bottle of champagne. Nowinski was not sure if any items were actually missing from the house. His backyard opens onto an alley, and the gate is generally left open.

Douglas Shelton lived on the 1300 block of O'Farrell. He went to work on the morning of January 27, 2003, but returned home at around 9:30 a.m. to pick up his cell phone. He noticed three men walking on the 1400 block, at least two of whom were African-American. The other was either African-American or Hispanic. The men seemed to be checking out the houses on the street. Shelton did not remember seeing them in the neighborhood before. He decided to attempt to follow them after retrieving his cell phone from his house. He drove past a man sitting in a black car parked on O'Farrell near Harbor View. He identified the man in court and in an earlier photographic line-up as James Boulden. Shelton could not tell if James was one of the three men he had seen earlier. He did not see James communicate with any other person. Shelton circled the area, and noticed when he got back to O'Farrell that the black car had moved and was parked on Harbor View near an alley. Shelton called 911 and described the men he had seen.

Ron Armesto lived on Sepulveda Street, in back of Nowinski's house. He was working in his garage at around 9:00 or 9:15 on the morning of January 27, 2003. His garage opens onto an alley. He saw three African-American men walking up the alley toward Harbor View. He stepped out of his garage to see

where they were going. About 15 to 20 minutes later, he saw two of them running up the alley in the same direction. He did not hear any noise from any of the nearby houses during that period. He was, however, using a band saw, drill, and other noisy power equipment during that period. He identified the two men he saw running up the alley as Marquis Land and Corey Boulden. He could not identify James Boulden as the third man he had seen earlier walking with the two.

On January 27, 2003, Rodrigo Escamilla, a gardener, was working in the 1400 block of O'Farrell. He started work at around 8:00 or 9:00 a.m. He observed a small black car containing three African-American men park on nearby Harbor View. The men walked down O'Farrell. Escamilla next saw them walk out of an alley between O'Farrell and West Sepulveda towards him. They were not carrying anything in their hands. One of the men asked for a drink of water from Escamilla's hose. The man who asked for water looked like James Boulden. The black car was moved from Harbor View to O'Farrell, closer to Escamilla's truck where he stored his tools. Escamilla became suspicious and wrote the car's license plate on his hand. The car was moved again, and about five or ten minutes later police officers came by. The officers asked Escamilla if he had seen anything, and he described the car to them, including the license plate. While he was talking to the officers, two men came out of the alley and ran toward Sepulveda. The officers followed them. Escamilla could not tell for sure if they were the same men he had seen before, but told the officers at the time that he thought they might be. Later, after things calmed down, Escamilla saw the black car again, parked in another location on O'Farrell. Escamilla was able to identify the car from a photograph shown to him in court.

Officer Phillip Tingirides responded to a call concerning a possible burglary at around 10:00 a.m. When the officer arrived on the scene, Escamilla showed him the license plate number he (Escamilla) had written on his hand. The officer saw

two men run out of the alley, and he broadcast their general description. He identified one of the men in court as Corey Boulden. At the preliminary hearing, however, he mistakenly identified James Boulden as one of the two men he had seen running. The officer attempted to keep visual contact with the two men as they continued to run. He later heard that three suspects had been detained.

Officer Andrew Simon heard a radio call concerning burglary suspects in the area of the 1400 block of O'Farrell at around 10:10 a.m. He arrived at the scene, and observed two African-American men climbing a wall or fence from a yard to the alley near O'Farrell, apparently from the Nowinski backyard. He identified Land as one of the men. He identified the other as Corey Boulden. Officer Simon detained Corey Boulden a few minutes later in the 1300 block of Sepulveda.

Officer Bruce Nelson, responding to a radio call a little after 10:00 a.m., saw a black car parked on O'Farrell. He pulled up behind and saw "a head pop up from down below." Officer Nelson took the man into custody. He was identified as James Boulden. Officer Nelson also gave chase to and detained Land about 10 minutes later, while he was running between houses near Sepulveda. Officer Nelson searched the black car but did not find any stolen items.

Detective Fred Mannion showed photographic six-packs to Armesto and Shelton. Shelton identified the driver of the black car as James Boulden. Armesto identified Land and Corey Boulden. Detective Mannion spoke to James after reading him his rights. James admitted that the black car belonged to him. A knife and screwdriver were found in the car.[6] There was no attempt to match the screwdriver to any marks at the impacted houses. None of the three defendants'

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[6] The defense objected to the admission into evidence of these items on grounds of relevancy and prejudice, but the court admitted them.

prints appeared in the houses or on any dislocated items. There was no cell phone, pager, or walkie-talkie found in the car or on any of the three defendants.

Ann DeYoung, forensic print specialist, was unable to find liftable prints at the Nowinski house. There were glove marks on some items. Two prints were obtained from the area of the attempted entry at the Adrid house.

The defense called Shatonia Stokes and Tyesha Sowell. Stokes lived near the area of the burglary. Sowell, Land's cousin, was staying with Stokes. They both testified that Stokes had made arrangements with Land for him to visit Sowell at Stoke's house on the morning of January 27, 2003. He never arrived.

DISCUSSION

I

On the first day of trial, the parties and the judge were discussing how many challenges each side would have and how many potential jurors should be called for voir dire. The court indicated a belief that only 35 or 40 potential jurors would be needed and stated: "As I indicated earlier, I'm ordering each of you not to violate *Wheeler*." The court was referring to *People v. Wheeler* (1978) 22 Cal.3d 258, the landmark case in which the Supreme Court held that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community" under article I, section 6 of the California Constitution. (22 Cal.3d at pp. 276-277.)

The court's decision to issue an order instructing counsel to avoid *Wheeler* violations may have derived from our opinion in *People v. Muhammad* (2003) 108 Cal.App.4th 313. That decision came about as a result of a flaw in the original remedy laid out by *Wheeler* to be applied where the trial court realizes that counsel

is exercising peremptory challenges in order to remove jurors who belong to a suspect class or other identifiable group. Whenever that occurred, "[t]he court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. So too it must quash any remaining venire . . . . Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew." (22 Cal.3d at pp. 280-282.)

In *People v. Willis* (2002) 27 Cal.4th 811, the Supreme Court explained how application of that remedy could lead to anomalous results. In *Willis*, the attorney for the defense objected to the entire panel of potential jurors as being unrepresentative of the community at large because it contained few non-Whites and not one Black. The trial court overruled the objection and required voir dire to proceed. Thereafter, defense counsel repeatedly challenged White males. The trial court found systematic exclusion of White males without justification, and admonished defense counsel "'not to violate *Wheeler* again'" under threat of "'personal monetary sanctions.'" (*Id*. at p. 815.) The court did not, however, excuse the venire.

On appeal, the Court of Appeal held that the trial court had no choice under *Wheeler* but to dismiss the entire venire, acknowledging that the remedy "'encourages both parties, if dissatisfied with the venire or the petit jury as it develops during the selection process, to violate the [*Wheeler*] rule so they can try and mold a new panel more to their liking . . . encouraging rather than deterring . . . violations.'" (*Willis*, *supra*, 27 Cal.4th at p. 817.) Although the Supreme Court reversed the Court of Appeal, it agreed that the described problem existed and concluded that a new discretionary remedy short of dismissal of the entire venire was needed because "situations can arise in which the remedy of mistrial

and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial." (*Id*. at p. 821.)

To prevent gamesmanship, the Supreme Court proposed the following alternative remedies: "Under such circumstances [where venire dismissal would reward challenges geared toward provoking such dismissal], and with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. In the event improperly challenged jurors have been discharged, . . . the court might [also] allow the innocent party additional peremptory challenges. [Citations.] [¶] Additionally, to ensure against undue prejudice to the party unsuccessfully making the peremptory challenge, the courts may employ the . . . procedure of using sidebar conferences followed by appropriate disclosure in open court as to *successful* challenges. [Citation.]" (*Willis*, *supra*, 27 Cal.4th at p. 821.)

The court in *Willis* noted that "[t]he complaining party [in the case before it] was the prosecution, which waived its rights to a new venire in favor of sanctioning defense counsel and continuing the proceedings." (27 Cal.4th at p. 823.) On balance, it appeared to the court "more appropriate, and consistent with the ends of justice, to permit the complaining party to waive the usual remedy of outright dismissal of the remaining venire." (*Ibid*.) The court "stress[ed] that such waiver or consent is a prerequisite to the use of such alternative remedies or sanctions, for *Wheeler* made clear that 'the complaining party is entitled to a random draw from an entire venire' and that dismissal of the remaining venire is the appropriate remedy for a violation of that right. [Citation.] Thus, trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party." (*Id*. at pp. 823-824.)

In *People v. Muhammad*, *supra*, 108 Cal.App.4th 313, this court was called on to decide whether the trial court had properly imposed monetary sanctions for a perceived *Wheeler* violation on the part of the prosecution. The court had granted a defense motion for mistrial and dismissed the venire, based on the prosecutor's unjustified peremptory challenges. The court then issued an order to show cause why the prosecutor should not be sanctioned $1,500 under section 177.5 of the Code of Civil Procedure, and after hearing, ordered the sanctions imposed. We concluded that Code of Civil Procedure section 177.5 did not apply in the absence of a preexisting order,[7] and reversed. In so holding, we said: "Certainly if a court admonishes counsel that a repetition of specific conduct will result in a monetary sanction, that statement is tantamount to an order not to repeat the conduct, and should suffice under section 177.5. . . . [¶] . . . [¶] . . . What should a trial court do in order to preserve the option of imposing a monetary sanction should the conduct of counsel merit that option? Make an order. Yet it seems degrading to the judicial process and to the attorneys who practice before our courts for a court to have to warn counsel that, on penalty of a monetary sanction, they must not violate the Constitution. Based on our reading of *Wheeler* cases in the literature, it appears that the issue usually is raised more than once if it is raised at all, thus giving the court an opportunity to issue an appropriate admonition." (108 Cal.App.4th at pp. 325-326.)

Citing *Muhammad*, appellants here point out that the trial court's order not to violate *Wheeler* contained an implicit threat to impose monetary sanctions of up to $1,500 if counsel wrongly challenged venire members. They contend that such

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[7] Code of Civil Procedure section 177.5 provides that a judicial officer has the power to impose monetary sanctions of up to $1,500 "for any violation of a lawful court order by a person, done without good cause or substantial justification."

an order creates a conflict of interest between defendants and defense counsel, in that defense counsel might be less than zealous in exercising peremptory challenges due to fear of incurring the wrath of the court. If counsel succumbs to such fear, there would be a potential negative impact on defendants' right to counsel. We disagree.

As can be seen, the decisions in both *Willis* and *Muhammad* expect that occasions will arise when counsel will come under threat of monetary sanctions for future violation of *Wheeler*. Neither this court nor the Supreme Court deemed such a possibility to be a serious impediment to a defendant's right to zealous representation by counsel. This is because a lawyer's duty "'to represent his client zealously'" must take place "'*within the bounds of the law*.'" (*People v. McKenzie* (1983) 34 Cal.3d 616, 631.) In issuing its order here, the trial court sought merely to ensure that counsel act within the boundaries of *Wheeler* when exercising peremptory challenges--something counsel was already required to do with or without a court order.

Concededly the decisions in *Willis* and *Muhammad* anticipated that the order containing the threat of sanctions would issue *after* problematic conduct on the part of counsel became evident during voir dire. Here, the court employed a prophylactic order prior to any misbehavior, intending to forestall a *Wheeler* problem. Although we have found no specific authority approving this procedure, it is generally recognized that """the trial judge [has] the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."""" (*People v. Shelley* (1984) 156 Cal.App.3d 521, 530.) "'In order to implement this duty, the trial judge is vested with both the statutory and the inherent power to exercise reasonable control over all proceedings connected with the litigation before him.'" (*Ibid*.) This means that "'the court has the authority "'to take whatever steps [are] necessary to see that no conduct on the part of any person obstructs the

administration of justice.’”’” (*Ibid*.) In this case, because of the multitude of parties in the case and the number of peremptory challenges allowed each side, the court acted reasonably to avoid predictable problems in jury selection. We find no fault in the court’s actions.

II

Land contends separately that the trial court abused its discretion when it refused to strike at least one prior felony conviction. In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the Supreme Court confirmed that trial courts have the discretionary power to strike prior felony conviction allegations--to “strike a strike”--in the furtherance of justice and after consideration of both the constitutional rights of the defendant and the interests of society represented by the prosecution. In *People v. Williams* (1998) 17 Cal.4th 148, the court further clarified the standard for striking a prior conviction allegation: “[T]he court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Id*. at p. 161.)

By way of illustration, we quote the court’s description of the defendant in *Williams*: “In light of the nature and circumstances of his present felony of driving under the influence, which he committed in 1995, and his prior conviction for the serious felony of attempted robbery and his prior conviction for the serious and violent felony of rape, both of which he suffered in 1982, and also in light of the particulars of his background, character, and prospects, which were not positive, [defendant] cannot be deemed outside the spirit of the Three Strikes law in any

part, and hence may not be treated as though he had not previously been convicted of those serious and/or violent felonies. [¶] There is little about [defendant's] present felony, or his prior serious and/or violent felony convictions, that is favorable to his position. Indeed, there is nothing. As to his present felony: It is a conviction of driving under the influence that followed three other convictions of driving under the influence; 'the existence of such convictions reveals that [he] had been taught, through the application of formal sanction, that [such] criminal conduct was unacceptable--but had failed or refused to learn his lesson' (*People v. Gallego* (1990) 52 Cal.3d 115, 209, fn. 1 . . . (conc. opn. of Mosk, J.)). As to his prior serious and/or violent felony convictions: The record on appeal is devoid of mitigation." (*Williams*, *supra*, 17 Cal.4th at pp. 162-163.)

In support of striking a strike here, Land presented evidence that he had been an exemplary youth until the age of 15, when his parents separated and his father moved 300 miles away. The evidence further showed that his two prior strikes were also residential burglaries, committed within a brief period of time when he was 18. He was 21 and on parole at the time of the underlying convictions, his third and fourth.

After hearing the evidence and argument, the trial court stated: "I am not at all adverse to striking strikes . . . . But there has to be some legitimate reason, otherwise it becomes an abuse of discretion. And what I have here is an individual who has two strikes that are . . . two years old. I have an individual that has committed two serious offenses on parole and then commits another serious offense within a matter of three years. And while it's unfortunate what the law is, I am not inclined based upon those facts to strike any strikes."

We review rulings on motions to strike prior convictions under the deferential abuse of discretion standard. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309.) "Under that standard an appellant who seeks reversal must demonstrate

that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*Id*. at pp. 309-310.)

Under this standard of review, Land has not demonstrated that the trial court abused its discretion in denying the motion to strike prior convictions. His immediate return to criminal activity as soon as he was paroled indicates that he is the type of repeat criminal the law was intended to deter--one who fails to learn the lessons about the unacceptability of unlawful conduct the penal system is intended to convey. The sentence imposed did not violate the spirit of the law.

III

Land contends that imposition of the sentence of 60 years to life for his crimes violates constitutional prohibitions against disproportionate or cruel and unusual punishment.

The courts have consistently rejected claims that lengthy terms imposed on recidivists violate the ban on cruel and unusual punishment. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 965; *Rummel v. Estelle* (1980) 445 U.S. 263, 284; *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1661-1665; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137.)

"Our Supreme Court has emphasized 'the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the

Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. While these intrinsically legislative functions are circumscribed by the constitutional limits of article I, section 17, the validity of enactments will not be questioned "unless their unconstitutionality clearly, positively, and unmistakably appears."' (*People v. Wingo* (1975) 14 Cal.3d 169, 174 . . . , fn. omitted.)" (*People v. Kinsey, supra,* 40 Cal.App.4th at p. 1630; *People v. Dillon* (1983) 34 Cal.3d 441, 477-478.)

"Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.]" (*People v. Cooper, supra*, 43 Cal.App.4th at pp. 823-824.) "[A]t some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies" society may be justified in "segregat[ing] that person from the rest of society for an extended period of time." (*Rummel v. Estelle, supra,* 445 U.S. at p. 284.) "This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Id*. at pp. 284-285.)

More recently, in *Lockyer v. Andrade* (2003) 538 U.S. 63 and *Ewing v. California* (2003) 538 U.S. 11, the United States Supreme Court upheld the constitutionality of sentences imposed under California's Three Strikes law under the following circumstances: (1) in *Andrade*, the most recent convictions were for petty theft, a nonserious offense, the prior strikes consisted of three residential burglaries, and defendant was sentenced to two consecutive terms of 25 years to life; and (2) in *Ewing*, the most recent conviction was for grand theft, a wobbler,

the prior strikes consisted of three residential burglaries and a robbery, and defendant was sentenced to 25 years to life. The court approved a state's "deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." (*Ewing v. California*, *supra*, at p. 24.)

Based on these precedents, there is no basis for concluding that imposition of this sentence constitutes disproportionate or cruel and unusual punishment under either the California Constitution or the United States Constitution.

IV

In a supplemental brief, Land contends that the trial court committed sentencing error as outlined in *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 by imposing consecutive sentences for his offenses. In *Apprendi*, defendant's sentence had been doubled because the trial court found the crime to have been motivated by racial animus. The court held that the doubling was improper because "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, at p. 490.)

The trial court in *Blakely* increased the defendant's sentence for kidnapping because it believed he had acted with "deliberate cruelty." (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) Defendant, a resident of Washington, had been charged with first degree kidnapping, and pled to second degree. Under Washington law, second degree kidnapping was a class B felony, and state law provided that "'no person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years.'" (*Ibid*., quoting Wash. Rev. Code Ann.

§ 9A.20.021(1)(b).) The "standard range" for a sentence for second degree kidnapping with a firearm was 49 to 53 months. (*Ibid.*, quoting Wash. Rev. Code Ann. § 9.94A.320.) However, a separate statutory provision permitted judges to impose a sentence above the standard range if they found "'substantial and compelling reasons justifying an exceptional sentence.'" (*Ibid.*, quoting Wash. Rev. Code Ann. § 9.94A.120(2).) Under Washington decisional authority, reasons used to justify an exceptional sentence had to "'take[] into account factors other than those which are used in computing the standard range sentence for the offense.'" (*Ibid*., quoting *State v. Gore* (2001) 143 Wn.2d 288, 315-316 [21 P.3d 262].)

In *Blakely*, the court explained that the rule in *Apprendi* applied to the situation before it because: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] [so that] the judge exceeds his proper authority." (124 S.Ct. at p. 2537.) The danger, according to the court, was that such a judicial factfinding could relegate the jury to "making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." (*Id*. at p. 2539.) The Supreme Court concluded that the *Blakely* trial judge acted improperly because the facts supporting the finding of deliberate cruelty "were neither admitted by [the defendant] nor found by a jury." (124 S.Ct. at p. 2537.)

Turning to the question of whether *Blakely* applies to California's consecutive sentencing laws, we start with section 669 which requires the trial court "[w]hen [the defendant] is convicted of two or more crimes" to "direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." If the court fails "to determine how the terms of imprisonment on the second or subsequent judgment shall run, the terms of imprisonment on the second or subsequent judgment shall run concurrently." (§ 669.) Despite this language, courts have held "there is no . . . statutory presumption in favor of concurrent rather that consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

The statute does not specify the grounds on which the court's decision to impose consecutive sentencing must lie. Rule 4.425 of the Rules of Court lists a number of "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences": "(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) [Other criteria and limitations] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences."

Aggravating and mitigating circumstances are listed in rule 4.421 and rule 4.423, and include such matters as the violence involved in the crime, the degree of cruelty, viciousness, or callousness evidenced by the perpetrator, the vulnerability of the victim, threats made to witnesses, the perpetrator's active or passive role in committing the offense, and the presence or absence of a prior record.

Although a trial court contemplating whether to impose consecutive sentences may and often does consider aggravating and mitigating factors as part of its decisionmaking process, we do not believe that consecutive sentencing is impacted either by *Blakely* or its predecessor, *Apprendi*. The consecutive sentencing decision does not involve the facts necessary to constitute a statutory offense and the decision can only be made once the accused has been found beyond a reasonable doubt to have committed two or more offenses.

Prior to the decision in *Blakely*, but in the wake of *Apprendi,* the court in *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231, stated: "If the specific fact at issue is not an element of the crime but is a factor that comes into play only after the defendant had been found guilty of the charges beyond a reasonable doubt and no increase in sentence beyond the statutory maximum for the offense established by the jury is implicated, then the state may consider this factor based on a lesser standard of proof." (Fn. omitted.)

In *People v. Cleveland* (2001) 87 Cal.App.4th 263, defendant raised the similar issue of whether the rule announced in *Apprendi* was implicated by the trial court's refusal to apply section 654. "Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not

more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (87 Cal.App.4th at pp. 267-268.)

Because of the requirement that the trial court determine the offender's "intent and objective," defendant in *Cleveland* contended that application of section 654 ran afoul of *Apprendi*. (87 Cal.App.4th at p. 270.) The Court of Appeal disagreed: "Unlike in the 'hate crime' provision in *Apprendi*, section 654 is not a sentencing 'enhancement.' On the contrary, it is a sentencing 'reduction' statute. Section 654 is not a mandate of constitutional law. Instead, it is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively 'reduces' the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the maximum penalty beyond the statutory range authorized by the jury's verdict." (*Ibid*.)

We conclude that a trial court's imposition of consecutive sentences does not result in a usurpation of the jury's factfinding powers or defendant's due process rights as long as each sentence imposed is within each offense's prescribed statutory maximum. Land committed two separate burglaries with two sets of victims. Although our laws permitted the trial judge to order the separate sentences imposed for each crime run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and results in a lessening of

the prescribed sentence--not an enhancement. For these reasons, we do not agree that the sentence imposed is invalid under either *Blakely* or *Apprendi*.

V

Land and respondent are in agreement that the trial court erred in calculating presentence custody credit due to its misapplication of sections 2933.1 and 667.5, subdivision (c),[8] and that Land is entitled to 396 days of credit (264 actual plus 132 conduct) rather than 303 (264 actual plus 39 conduct).

VI

Corey Boulden and respondent are in agreement that the trial court erred in calculating Corey's sentence on count two. Corey was convicted of *attempted* first degree burglary in that count and the court imposed sentence as if the conviction were for a completed first degree burglary. With certain exceptions not applicable here, state prison terms for attempts are to be one-half the terms for completed crimes. (§ 664, subd. (a).) The parties agree that the sentence of 32 months imposed by the court for count two should be reduced to 16 months.

DISPOSITION

Marquis Land's abstract of judgment is ordered modified to reflect 396 days of presentence credit consisting of 264 days of actual credit and 132 days of conduct credit. Corey Boulden's abstract of judgment is ordered modified to

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[8] Section 2933.1, subdivision (a) provides that a person who is convicted of a felony offense listed in section 667.5, subdivision (c) "shall accrue no more than 15 percent of worktime credit." Section 667.5, subdivision (c) applies to residential burglary only where "it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary." (§ 667.5, subd. (c)(21).)

reflect imposition of a sentence of 16 months (1 year, 4 months) for count two, attempted burglary. As modified, the judgments are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

CURRY, J.

We concur:

EPSTEIN, P.J.

GRIMES, J.**

** Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.